Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1162

PETER JORDAN, et al., *Petitioners,*

v.

THE UNIVERSITY OF TENNESSEE;
BOARD OF REGENTS, STATE UNIVERSITY AND
COMMUNITY COLLEGE SYSTEM, TENNESSEE;
TENNESSEE HIGHER EDUCATION COMMISSION;
RITA SANDERS GEIER, et al.;
UNITED STATES OF AMERICA;
RAYMOND RICHARDSON, JR., et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

PETER JORDAN, et al., Petitioners,

v.

THE UNIVERSITY OF TENNESSEE,
BOARD OF REGENTS, STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM, TENNESSEE,
TENNESSEE HIGHER EDUCATION COMMISSION,
RITA SANDERS GEIER, et. al,.
UNITED STATES OF AMERICA,
RAYMOND RICHARDSON, JR., et. al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioners, Peter Jordan, et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on October 27, 1978.

OPINION BELOW

There was no formal opinion of the District Court. The Order of the District Court denying the Motion to Intervene is reproduced in Appendix B to this Petition.

No opinion was rendered by the Court of Appeals; its order affirming the denial of intervention is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 27, 1978 (infra., Appendix A), and

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[1] Petitioners are Dr. Peter Jordan, Dr. Wayne Billings, Dr. John Hasty, Dr. Lewis Laska, Dorothy Edmond, Janie Murphree and Dr. Sherrye Young.

this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether it is error to consider lapse of time as dispositive in determining the timeliness of a motion for intervention pursuant to Rule 24(a) and 24(b), Federal Rules of Civil Procedure.
2. Whether intervention must be allowed in this case to safeguard faculty interests while facilitating desegregation and avoiding the delay of a multiplicity of litigation.

RULES INVOLVED

Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure are set forth in Appendix C, infra.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq., and under 28 U.S.C. §1331 (general federal question jurisdiction).

Petitioners here are certain faculty members at the University of Tennessee at Nashville (hereinafter UT-N), who sought to intervene in the case of Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977), pursuant to Rules 24(a) and 24(b), Federal Rules of Civil Procedure. Trial was held from September 20, 1976, through October 20, 1976, and the District Court rendered its opinion in Geier, supra, on January 31, 1977. Explaining that UT-N had fostered a "competition" for students, the Court ordered what it called "a radical remedy": that UT-N be merged into Tennessee State University (hereinafter TSU), an historically Black university, by July 1, 1980, under the con-

trol of the governing body of TSU. Geier, supra, 427, F. Supp. 660, 661. The Court expressly retained jurisdiction and allowed the parties until February 22, 1977, to submit a judgment. Id. at 661, 662.

On February 22, 1977, the Petitioners here sought intervention to safeguard their constitutionally protected employment rights by helping to define and plan the consolidated university. The faculty sought to insure that the merger plan and its implementation contained standards for the protection of tenure and the expectation of continued employment, particularly that affected faculty be appointed and assigned according to "definite objective standards of employment" without regard to race. Accordingly, Petitioners also submitted as an "Offer of Judgment" a document, Conceptual Plan for the Merger of UT-N and TSU, which included such employment standards.

On February 28, 1977, the judgment ordering the merger of UT-N and TSU was

entered. On the same day, Petitioners' motion to intervene was denied (Appendix B, infra), the Court being of the opinion that, "Any interests the intervening Plaintiffs assert in their motion could have been asserted much earlier during the long history of this suit, since merger of the two institutions has been a proposal before this Court for several years. The Court finds this delay inexcusable." Although the court recognized Petitioners sought to protect their interests during the merger, it found the proposed plan "unnecessary" since the court was not going to determine all the details of merger itself, but had placed that duty in the hands of the Board of Regents and the Advisory Committee, according to its Judgment entered that day.

The Sixth Circuit Court of Appeals in an Order entered October 27, 1978, (Appendix A, infra) said that the trial court's denial of intervention did not violate Rule 24(a) and was not an abuse

of discretion under Rule 24(b). The court also said it did not appear the movants were deprived thereby of any opportunity to protect their interests in other available courses of action.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER STANDARD TO USE IN DETERMINING THE "TIMELINESS" OF A MOTION PURSUANT TO RULE 24, FEDERAL RULE OF CIVIL PROCEDURE.

The District Court applied an impermissible "time-only" or "several-years" standard of timeliness in denying intervention. This standard directly conflicts with Supreme Court decisions rejecting the time-only test. "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not disposi-

tive. Timeliness is to be determined from all the circumstances." National Association for the Advancement of Colored People v. New York, 413 U.S. 345, 366. Other Courts of Appeals have adhered to the totality of circumstances standard. See, Johnson v. San Francisco Unified School District, 500 F. 2d 349, 354 (9th Cir. 1974); Nevilles v. EEOC, 511 F. 2d 303, 305 (8th Cir. 1975); EEOC v. United Airlines, 515 F. 2d 946, 949 (7th Cir. 1975); Chase Manhattan Bank v. Corparacion Hotelera, 516 F. 2d 1047, 1049 (1st Cir. 1975); Smith Petroleum Services, Inc. v. Monsanto Chemical Co., 420 F. 2d 1103, 1105 (5th Cir. 1970).

Furthermore, Penick v. Columbus Education Association, 574 F. 2d 889 (6th Cir. 1978), cited in this case by the Court of Appeals, considered other circumstances besides lapse of time in determining the timeliness of intervention; therefore, the decision below conflicts with earlier Sixth Circuit cases as well.

The strong language of the District Court's order indicates the unduly heavy reliance that was placed on lapse of time. Under the proper standards of timeliness, other circumstances such as prejudice to other parties and the reason for delay must be considered. Nevilles v. EEOC, supra at 305. Since intervention was sought solely on a prospective basis to aid in formulating merger plans, prejudice to other parties is minimal. Allowing UT-N faculty to aid in planning a smooth transition could not be prejudicial or detrimental to other interests involved. Petitioners did not intervene earlier in the suit since they did not seek to oppose the merger.

Petitioners sought only to intervene when merger was ordered, to ensure the protection of their academic freedom and tenure and to promote prompt and orderly desegregation. Considering the other circumstances involved, intervention was both timely and appropriate at the point it was raised.

The lower court considered whether Petitioners' proposals were necessary and

the Court of Appeals considered whether other courses of action may still be available. However, these concerns do not go to the question of timeliness. Whether a motion is timely cannot depend on other alternatives or a pre-hearing evaluation of the necessity of considering a movant's proposals.

2. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS IN FACILITATING EXPEDITIOUS AND ORDERLY DESEGREGATION THROUGH FACULTY INVOLVEMENT IN DESEGREGATION PLANNING.

The policy of desegregation is of such vital importance that this Court should grant certiorari to protect the interests of faculty members in order to facilitate desegregation. This case provides such an opportunity for the Court to ensure the preservation of constitutionally protected faculty interests while avoiding delay in the desegregation process. The District Court characterized its merger order as "admittedly a radical remedy," Geier, supra, 427 F. Supp. 660. The merger orderthreatens the Petitioners' tenure

and expectation of employment by severing their employee-employer relationship and failing to include standards for protecting faculty.

Faculty involvement in desegregation planning is important because it helps prevent future litigation when or if faculty rights are violated. Faculty dislocation because of consolidation in the public schools has been a grievous problem. See, Jefferson, School Desegregation and the Black Teacher: A Search for Effective Remedies, 48 TULANE LAW REVIEW 55, 82-84 (1973). The UT-N faculty must not be required to litigate their claims individually. The expense and multiplicity of such litigation, as well as the resultant delay in effectuating desegregation should be avoided. Intervention is the proper vehicle for pressing these claims. In fact, some courts require that individual suits in desegregation cases be brought through intervention or simply treat them as such. Davis v. Board of School Commissioners of Mobile County, 517 F. 2d 1044 (5th Cir. 1975). Strange v. Board of Education of

Greenville Municipal Separate School District, 70 F.R.D. 465 (N.D. Miss. 1975).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Sixth Circuit. In the alternative, this Court should grant Petitioners intervention nunc pro tunc. United States v. Board of School Supervisors of the City of Indianapolis, Indiana, 466 F. 2d 573, 576 (7th Cir. 1969).

Respectfully submitted,

LEWIS L. LASKA
COUNSEL FOR PETITIONERS

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER JORDAN,et al.,
Proposed Intervenors-
Appellants

V. 77-1620

UNITED STATES OF AMERICA,
Plaintiff-Intervenor
Appellee

STATE BOARD OF REGENTS,
Defendant-Appellee

RITA SANDERS GEIER,et al.,
Plaintiffs-Appellees

RAYMOND RICHARDSON,JR.,et al.,
Plaintiffs-Intervenors-
Appellees

ORDER

Before: LIVELY and ENGEL, Circuit Judges
and PECK, Senior Circuit Judge

Appellants herein are certain members of the faculty of the University of Tennessee at Nashville, who unsuccessfully sought the leave of the district court to intervene under Rule 24(a) and 24(b) Fed. R. Civ. P. in desegregation litigathen pending in the United States Dist-

rict Court for the Middle District of Tennessee. Appellants allege that they desire to intervene primarily to protect their interests as faculty members of UT-N in any merger of Tennessee State University and UT-N into a single institution.

Upon a careful examination of the records and briefs of the parties and of their oral arguments before this court, the court is of the opinion that the trial court's denial of the motion to intervene did not violate Rule 24(a). The court is further of the opinion that the trial court did not abuse its discretion under Rule 24(b) in not permitting intervention. Penick v. Columbus Education, 574 F. 2d 889 (6th Cir. 1978). It does not appear that the appellants are deprived thereby of any right and opportunity to protect their interests by other courses of action available to them. Accordingly, IT IS ORDERED that the judgment of the district court from which appeal herein is taken is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
October 27,1978

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER,et al.,
Plaintiffs

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

RAYMOND RICHARDSON,JR.,et al.,
Plaintiff-Intervenors

VS.

RAY BLANTON,et al.,
Defendants

CIVIL ACTION
No. 5077

ORDER

This action is before the court on the motion of several members of the Faculty Council of the University of Tennessee at Nashville for leave to intervene under Rule 24(a) and (b), Federal Rules of Civil Procedure. The motion is accompanied by two documents styled "BRIEF OF PLAINTIFF PETER JORDAN, ET AL. IN SUPPORT OF MOTION AND COMPLAINT TO INTERVENE" and "OFFER OF JUDGMENT."

The movants are attempting primarily to protect their interests as faculty members of UT-N in the merger of Tennessee State University and UT-N into a single

institution. Any interests the intervening plaintiffs assert in their motion could have been asserted much earlier during the long history of this lawsuit, since merger of the two institutions has been a proposal before this court for several years. The court finds this delay inexcusable.

In addition, the court takes note that the chief reason for the motion to intervene is the movants' desire to offer a proposed judgment consisting of a detailed plan to effectuate the merger, which plan purports to protect their interests. The court is filing contemporaneously with this Order a Judgment in this action. It will be noted that this Judgment is consistent with the memorandum decision heretofore entered and does not purport to determine all details of the merger since the court feels that such action would be both unwise and unwarranted. Thus, the type of proposal the movants seek to place before the court is deemed unnecessary.

The court assumes, of course, that the plan of merger, formulated by the

State Board of Regents, will not violate the legal rights of anyone, including the movants. Any concerns the movants desire to express may be expressed during the State planning process outlined in the Judgment.

In light of the foregoing discussion, the motion to intervene is DENIED.

It is so ORDERED.

Frank Gray,Jr.
CHIEF JUDGE

February 28,1977

Appendix C

Rule 24(a) and 24(b)
Federal Rules of Civil Procedure

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing document to the attorneys below this 22d day of January, 1979.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE
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On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

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BRIEF IN OPPOSITION

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Raymond Richardson, Jr., et al., plaintiffs-intervenors below, respectfully request that the petition for a writ of certiorari to review the opinion of the Sixth Circuit be denied.

QUESTION PRESENTED

Whether denial of intervention pursuant to Rule 24(a) and (b), Fed. R. Civ. Pro., was an abuse of discretion?

STATEMENT OF THE CASE

This civil rights class action to desegregate the public higher education system in the State of Tennessee was filed by black students, faculty members and citizens in May 1968. Geier v. Blanton, 427 F.Supp. 644, 645 (M.D. Tenn. 1977). The United States and additional black students, faculty and administrators intervened in the action in 1968 and 1972 respectfully, and the action has been vigorously litigated since. 427 F.Supp. at 645-650. On January 31, 1977, the district court held, inter alia, that the dual system imposed by law remained undismantled, and that the traditionally black public higher education institution in Nashville, Tennessee (Tennessee State University) and a traditionally white public higher education institution in the same city (the University of Tennessee at Nashville) should be merged. 427 F.Supp. at 657-661. The

district court required that state defendants establish administrative procedures to develop an appropriate desegregation plan. 427 F.Supp. at 661-662.

Petitioners Peter Jordan, et al., white faculty members of the University of Tennessee at Nashville, sought intervention in order to present a plan of merger of the two institutions between the date of the district court's opinion of January 31, 1977, and the judgment of February 28, 1977. Intervention was denied as untimely and unnecessary. Pet. 15-17. The court of appeals affirmed. Pet. 13-14.

ARGUMENT

1. The two courts below did not abuse their discretion by declining to grant intervention. Petitioners' motion to intervene was filed 9 years after the action was originally filed, 5 years after state defendants were first ordered to consider the the feasibility of merger, several months after 30 days of trial on whether merger was an appropriate remedy, and only after the district court had already ordered defendants

to establish administrative procedures to develop a merger plan. See, 427 F.Supp. at 645-659. Intervention was clearly untimely under all the circumstances. NAACP v. New York, 413 U.S. 345, 364-366 (1973). In addition, both the district court and court of appeals expressly found intervention unnecessary in light of administrative procedures available to petitioners to advance their views on merger. Pet. 14, 16-17. Petitioners thus have suffered no prejudice.

2. The petition presents no significant or important questions requiring review. There simply is no conflict with any authority in light of the findings that delay was inexcusable and that alternative procedures for petitioners to express their interests are available. Pet 16-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

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PETER JORDAN, ET AL., PETITIONERS

v.

THE UNIVERSITY OF TENNESSEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported. The order of the district court (Pet. App. B) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1978. The petition for a writ of certiorari was filed on January 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the district court did not abuse its discretion in denying petitioners' motion to intervene in this case.

STATEMENT

1. This litigation began more than a decade ago when private plaintiffs, both black and white citizens of the State of Tennessee, sued to enjoin the proposed expansion of the University of Tennessee-Nashville Center (UT-N). See *Sanders* v. *Ellington,* 288 F. Supp. 937 (M.D. Tenn. 1968); *Geier* v. *Dunn,* 337 F. Supp. 573 (M.D. Tenn. 1972). The plaintiffs alleged that Tennessee Agricultural and Industrial State University, now Tennessee State University (TSU), was originally established as a public institution of higher education for blacks; that appropriations for TSU were not provided on a basis equal to those of the state's predominantly white institutions; that TSU was being maintained by State officials as a segregated black institution in violation of the Fourteenth Amendment; and that the proposed construction of new facilities at the predominantly white UT-N would ensure the continued existence of a dual system of public higher education in Tennessee by perpetuating the role of TSU as a segregated black institution. *Geier* v. *Blanton,* 427 F. Supp. 644, 645 (M.D. Tenn. 1977).

In 1968, the United States applied for and was granted leave to intervene as a party plaintiff in the action. The United States joined the plaintiffs in many of their substantive allegations and requested, in addition to the relief plaintiffs had sought, that State officials be required to formulate and submit to the court a plan of desegregation designed to eliminate the dual system of public higher education in Tennessee. *Ibid.*

In its decision on the merits, the district court agreed "that the dual system of education [in Tennessee] created originally by law has not been effectively dismantled." *Sanders* v. *Ellington, supra,* 288 F. Supp. at 940. The court concluded, however, that the construction of new facilities at UT-N would not perpetuate the dual system of education and thus declined to enjoin this construction.

Id. at 941-942. Instead, the court ordered the parties to submit plans to dismantle the system of segregated higher education in Tennessee, with particular attention to be given to TSU. *Id.* at 942-943.

Plans were eventually submitted pursuant to the court's order and a month-long evidentiary hearing on appropriate relief was held in 1976. On January 31, 1977, the district court entered an opinion stating that it would require UT-N and TSU to be merged by July 1, 1980, as a single institution of higher education under the governance of the State Board of Regents. *Geier* v. *Blanton, supra,* 427 F. Supp. at 660-661.

2. On February 22, 1977, before any judgment was entered by the district court pursuant to its decision, petitioners sought to intervene in the litigation. Petitioners, who are faculty members of UT-N, submitted as an "Offer of Judgment" a document purporting to set out standards to safeguard petitioners' tenure and employment rights during the merger of the two universities.

On February 28, 1977, the district court entered its judgment ordering the merger of UT-N and TSU under plans to be developed by the State Board of Regents.[1] 427 F. Supp. at 661. At the same time, the court denied petitioners' motion to intervene. The court stated that "[a]ny interests the intervening plaintiffs assert in their motion could have been asserted much earlier during the long history of this lawsuit, since merger of the two institutions has been a proposal before this court for several years" (Pet. App. 16).

The court of appeals affirmed. The court concluded that the district court did not abuse its discretion in denying intervention, and noted that petitioners had not

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[1]Some of the state respondents appealed this judgment. Oral argument in the court of appeals was held in October 1978. The case is under submission.

been deprived of their "right and opportunity to protect their interests by other courses of action available to them" (Pet. App. 14).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' motion to intervene. The decision in this case is not in conflict with any other decisions and further review by this Court is unwarranted.

Petitioners recognize (Pet. 7-8) that whether a motion for intervention is timely under Rule 24 of the Federal Rules of Civil Procedure (*NAACP* v. *New York*, 413 U.S. 345, 366 (1973); footnotes omitted)

> is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Petitioners contend (Pet. 9), however, that the district court abused its discretion in this case because an "unduly heavy reliance * * * was placed on lapse of time" in determining that intervention was untimely.

Contrary to petitioners' claim, the district court did not "unduly," or exclusively (Pet. 7), rely on the lateness of petitioners' motion in its decision denying intervention. Instead, the district court's decision (Pet. App. 15-17) reflects its thorough consideration of the circumstances relevant to petitioners' motion to intervene. To be sure, the court emphasized the protracted history of the litigation and petitioners' substantial delay in seeking intervention (Pet. App. 16). The court also explained, however, that petitioners would not be prejudiced by the denial of their motion to intervene because they may express their employment concerns to the State Board of Regents under the merger planning process established by the court's order (Pet. App. 17).

The court of appeals fully examined the record and concluded that denial of intervention in the particular context of this case was not an abuse of discretion. There is no reason for this Court to review this essentially factual determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03